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Still in Balance? Federal District Court Discretion and Appellate Review Six Years after *Booker*

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In the six years since the United States Supreme Court decision in *United States v. Booker*,[1] federal courts have been faced with the challenge of balancing newfound district court discretion with the need to maintain consistent and predictable appellate review of sentencing decisions. In response, the Supreme Court subsequently decided *Rita v. United States*,[2] *Gall v. United States*,[3] and *Kimbrough v. United States*[4] in an attempt to further clarify the rules governing federal sentencing practice. Despite these attempts, federal district courts and courts of appeals continue to encounter some confusion and inconsistency in sentencing.

My previous article, entitled *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*,[5] began a discussion of federal sentencing in the post-*Booker* world. The article proposed a new approach to sentencing issues called "guided discretion,"[6] which attempted to reconcile the need for discretionary sentencing with the need for consistent and predictable appellate review. The article encouraged the federal judiciary to follow a simple template

1. 543 U.S. 220 (2005).
2. 551 U.S. 338 (2007).
3. 552 U.S. 38 (2007).
4. 552 U.S. 85 (2007).
5. D. Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65 (2007).
6. *Id.* at 82.

when sentencing, one that urged district court judges to temper their discretion with careful consideration of both the United States Sentencing Commission policy statements and the advisory guidelines sentencing range.[7] At the court of appeals level, the article encouraged judges to employ reasonableness review as outlined in both *Rita* and *Gall*.[8]

The first article acknowledged, however, that more changes were likely to come in the wake of *Rita* and *Gall* as district courts began exercising their newfound discretion and as courts of appeals began to review the results of that discretion.[9] Additionally, the original article did not contain a discussion of the decision in *Kimbrough*, which has further impacted federal sentencing. Given the changes over the last several years, the time has come to reexamine the effect that *Booker*, *Rita*, *Gall*, and *Kimbrough* have had on the federal sentencing landscape.

This article will proceed in four parts. Part I will address the historical development of Supreme Court sentencing jurisprudence from *Booker* to *Kimbrough*. This discussion will identify the directives in *Booker* and its progeny regarding both district court discretion and appellate court review. Part II will address the sentencing issues currently facing the courts of appeals, particularly the struggle to define substantive reasonableness review. It will also examine the differing approaches that some courts have taken in the wake of *Kimbrough* as they have tried to define the proper deference to be given to district court sentencing decisions. Part III will analyze statistical evidence compiled by the Sentencing Commission to determine whether district judges' sentencing habits and practices have changed significantly in light of their newfound discretion and whether the courts of appeals have significantly changed how they review sentencing decisions. Finally, Part IV will look forward to the months and years ahead, when courts will continue searching for a balance between discretion and appellate review. To overcome some of these challenges, I will expand on the theory of guided discretion by urging district court judges to continue imposing reasoned and well-explained sentences that reflect all of the requirements in § 3553(a), while limiting their use of discretion to only those cases where it is necessary. I will also encourage the courts of appeals to continue following Supreme Court precedent, particularly those portions of *Gall* and

7. *Id.* at 88-96.
8. *Id.* at 96-98.
9. *Id.* at 98.

Kimbrough that permit closer scrutiny of district court discretion. By implementing these goals, federal courts will hopefully usher in a new age of sentencing that strikes a balance between increased district court discretion and rational, consistent appellate review.

I. HISTORICAL OVERVIEW OF POST-*BOOKER* SENTENCING REFORM: THE REEMERGENCE OF JUDICIAL DISCRETION

After *Booker* made the Sentencing Guidelines advisory, *Rita*, *Gall*, and *Kimbrough* have each refined sentencing practices throughout the federal judiciary. At the district court level, these cases have substantially increased judges' discretion to impose sentences outside of the advisory Guidelines range. Consequently, *Booker* and its progeny have also led to difficulties at the appellate level, where the courts of appeals must now review sentences for "reasonableness," while still affording a great deal of deference to the sentencing judge. Therefore, the post-*Booker* cases have done little to clarify reasonableness review, particularly in the enigmatic realm of "substantive reasonableness."

A. The Booker Quartet of Cases

The history of *Booker* can be traced to *Apprendi v. New Jersey*,[10] which addressed the potential constitutional problems associated with judicial fact-finding in criminal cases:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.[11]

The principle established in *Apprendi* was later applied to mandatory sentencing guidelines in the seminal case of *Blakely v. Washington*,[12] where the Supreme Court invalidated Washington's mandatory sentencing guidelines scheme on Sixth Amendment grounds.[13]

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10. 530 U.S. 466 (2000).
11. *Apprendi*, 530 U.S. at 476 (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)).
12. 542 U.S. 296 (2004).
13. *Blakely*, 542 U.S. at 303-05.

1. *United States v. Booker: The Sentencing Guidelines are no Longer Mandatory*

Six months later, the Supreme Court addressed *Blakely*'s effect on the Federal Sentencing Guidelines in *Booker* and a related case, *United States v. Fanfan*.[14] In *Booker*[15] the Supreme Court determined that the Sentencing Guidelines violated a defendant's Sixth Amendment rights by allowing judges to alter a defendant's sentence based on facts that had not been proven to a jury.[16] To correct this problem, the Supreme Court determined that, rather than finding the entire Guidelines scheme unconstitutional or grafting a jury requirement onto each fact that affected a Guidelines sentence, Congress would prefer that the unconstitutional portions of the Sentencing Reform Act[17] be excised.[18] Therefore, the Court removed 18 U.S.C. § 3553(b)(1), thus rendering the Guidelines effectively advisory and outside the scope of *Apprendi*.[19] Although the Guidelines were no longer mandatory, the *Booker* Court maintained that sentencing judges were still required to consider them as one of the seven factors set forth in Section 3553(a).[20]

In applying this remedy, the Court also had to excise the portion setting forth the standard for appellate review,[21] because that provision contained "critical cross-references" to the other excised portions.[22] Section 3742(e) had previously provided for de novo review of a district court's sentencing determination, but once it was excised, the Court noted that there remained an implicit standard of review in the newly revised guidelines:[23]

> [w]e infer appropriate review standards from related statutory language, the structure of the statute, and the 'sound administration of justice.' . . . And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of re-

14. 543 U.S. 220 (2004).
15. For ease of reference, *Booker* and *Fanfan* are generally referred to by the single name: *Booker*.
16. 542 U.S. at 233-34, 248.
17. Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3742, 28 U.S.C. §§ 991-998 (2010).
18. *Booker*, 543 U.S. at 248-49.
19. *Id.* at 259.
20. *Id.* at 259-60.
21. 18 U.S.C. § 3742(e).
22. *Booker*, 543 U.S. at 260.
23. *Id.*

view already familiar to appellate courts: review for 'unreasonable[ness].'[24]

Therefore, since *Booker*, courts of appeals no longer review federal sentences de novo, but instead must review for "reasonableness."[25] While that may have appeared to resolve the issue, rendering the Guidelines advisory was simply the first step in a judicial restructuring of sentencing and sentencing review. After *Booker*, district courts and courts of appeals began the challenging process of discerning how to sentence in an age of newfound discretion.

2. *Rita v. United States: Courts of Appeals May Presume Reasonableness*

Following *Booker*, the courts of appeals struggled to articulate a consistent process for conducting reasonableness review. In response, some courts of appeals adopted a rule allowing within-Guidelines sentences to be presumed reasonable,[26] while others did not.[27] The disagreement among the courts of appeals centered around whether adopting the presumption would make the Sentencing Guidelines functionally mandatory, thereby violating *Booker*.

The Supreme Court resolved the disagreement in *Rita v. United States* by holding that a court of appeals may invoke a presumption of reasonableness when reviewing a within-Guidelines sentence.[28] The Supreme Court emphasized that the presumption was not binding, nor did it "reflect strong judicial deference" to the sentencing judge.[29] Instead, the rule merely recognized that when a district judge imposed a within-Guidelines sentence, it indicated that both the judge and the Sentencing Commission had reached the same conclusion, thus "significantly increas[ing] the likelihood

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24. *Id.* at 260-61 (citations omitted).

25. *Id.* at 264.

26. *E.g.*, United States v. Cage, 458 F.3d 537, 541 (6th Cir. 2006); United States v. Smith, 440 F.3d 704, 707 (5th Cir. 2006); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006); United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Cawthorn, 429 F.3d 793, 802 (8th Cir. 2005); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005).

27. *E.g.*, United States v. Zavala, 443 F.3d 1165, 1171 (9th Cir. 2006); United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006); United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006); United States v. Cooper, 437 F.3d 324, 331-32 (3d Cir. 2006).

28. *Rita*, 551 U.S. at 347.

29. *Id.*

that the sentence [was] reasonable . . . ."[30] It is important to note, however, that the *Rita* presumption only applies to appellate review, and does not allow district courts to simply impose a within-Guidelines sentence without any further consideration.[31] Rather, district courts must still consider all of the Section 3553(a) factors when imposing a sentence and make a discretionary, yet reasoned decision based on those factors. Unfortunately, the *Rita* presumption only applied to within-Guidelines sentences, thus leaving federal courts of appeals without guidance when a district court imposed a sentence outside the Sentencing Guidelines range.

3. *Gall v. United States: Adopts the Abuse-of-Discretion Standard*

The Supreme Court further developed the concept of reasonableness review in *Gall v. United States*, in which the Court was tasked with determining whether a court of appeals could apply a "proportionality test" to determine whether a sentence imposed outside the Guidelines range was reasonable.[32] Under the test, district courts were required to provide "extraordinary circumstances" to justify a sentence that substantially deviated from the advisory Guidelines range.[33] Once again, courts of appeals were divided.[34] The *Gall* Court confirmed that courts of appeals must review all sentences—regardless of where they fall in relation to the Guidelines range—under the deferential abuse-of-discretion standard.[35] By applying this deferential standard to all sentences, the *Gall* Court reaffirmed its commitment to increasing district court discretion in sentencing decisions.

In addition to announcing a concrete standard of review, *Gall*'s other significant contribution has been the creation of a bifurcated system of appellate review that requires analysis for both procedural and substantive reasonableness.[36] Under the procedural prong, courts of appeals were directed to:

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30. *Id.*
31. *Id.* at 351.
32. *Gall*, 552 U.S. at 40-41.
33. *Id.* at 41.
34. *Compare* United States v. Claiborne, 439 F.3d 479, 481 (8th Cir. 2006) (holding that an extraordinary deviation from the Guidelines must be justified by extraordinary circumstances); *with Jimenez-Beltre*, 440 F.3d at 518 (stating that Guidelines cannot be given presumptive weight or be presumed to be correct).
35. *Gall*, 552 U.S. at 51.
36. *Id.*

> ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range.[37]

Procedural reasonableness is a fairly straightforward analysis, requiring the court of appeals to "double check" the Guidelines calculation made by the district court, review the basis for any departure, and ensure that the district court considered all of the Section 3553(a) factors.[38]

Once a court of appeals has determined that the sentence is procedurally sound, it may then proceed to the second prong of the *Gall* test, which requires the courts of appeals to:

> take into account the totality of the circumstances, including the extent of any variance from the Guidelines range . . . . [I]f the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.[39]

Based on this test, the Supreme Court concluded that reasonableness review, as defined in *Booker* and *Gall*, should be "pellucidly clear."[40] Despite this assurance, the courts of appeals have remained uncertain about the "contours" of substantive reasonableness review.[41]

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37. *Id.*

38. United States v. Wright, 642 F.3d 148, 152 (3d Cir. 2011). In a recent lengthy opinion, the United States Court of Appeals for the Third Circuit overturned two sentences on procedural reasonableness grounds, and in so doing, conducted an extensive discussion of appellate review of sentences for procedural reasonableness. United States v. Fumo, Nos. 09-3388, 09-3389, 09-3390, 2011 WL 3672774, at *15-*31 (3d Cir. Aug. 23, 2011).

39. *Gall*, 552 U.S. at 51.

40. *Id.* at 46.

41. *See generally* Laura I. Appleman, *Toward a Common Law of Sentencing,* Gall, Kimbrough, *and the Search for Reasonableness*, 21 FED. SENT'G REP. 3, 3 (2008) (noting that, "[u]nfortunately for sentencing fans . . . the Court failed to clarify the definition of reasonableness, leaving courts in the same indeterminate muddle as before.").

4. *Kimbrough v. United States: Policy Disagreement Allowed*

Following *Gall*, the Supreme Court completed the *Booker* quartet of cases with *Kimbrough v. United States*. *Kimbrough* was unique among the four cases in that the underlying crime was of particular importance, specifically, a conviction for the manufacture and distribution of crack cocaine in violation of 21 U.S.C. § 841.[42] The Sentencing Guideline in question in *Kimbrough* was Section 2D1.1(c),[43] which subjected the defendant to a sentence equivalent to that of someone dealing one hundred times more powder cocaine.[44] The Court addressed the question of whether a sentence outside the advisory Guideline range "'is per se unreasonable when it is based on a disagreement with the [100-to-1] sentencing disparity for crack and powder cocaine offenses.'"[45] The sentencing judge in *Kimbrough* recognized the "'disproportionate and unjust effect that crack cocaine guidelines have in sentencing,'" and thus sentenced Kimbrough to fifteen years in prison, four years below the minimum Guidelines sentence.[46] The United States Court of Appeals for the Fourth Circuit vacated the sentence, noting that the sentence was "per se unreasonable" because it was based on a policy disagreement with the crack/powder sentencing disparity in the Guidelines.[47] The Supreme Court granted certiorari to resolve a split among the courts of appeals.[48]

The *Kimbrough* Court determined that the Sentencing Commission did not exercise its "characteristic institutional role" in formulating the crack cocaine Guideline; rather, it had relied almost exclusively on the mandatory minimum sentences set forth in the Anti-Drug Abuse Act of 1986.[49] Since the Sentencing Commission failed to apply the data and experience normally used to formulate the Guidelines, the Court determined that the district judge was better situated to formulate a sentence that met the requirements of Section 3553(a).[50] Thus, the Supreme Court concluded that a judge could sentence a defendant outside the Guideline range

42. *Kimbrough*, 552 U.S. at 91.
43. *Id.* at 91-92 (citing U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2010).
44. *Id.*
45. *Id.* at 91 (quoting United States v. Kimbrough, 174 F. App'x 798, 799 (4th Cir. 2006)).
46. *Id.* at 93.
47. *Kimbrough*, 552 U.S. at 93.
48. *See id.* at 93 n.4 (citing cases).
49. *Id.* at 109.
50. *Id.* at 110

based on his or her policy disagreement with the disparity between powder and crack sentences in the Guidelines, provided the sentence was framed "in line" with the requirements of Section 3553(a).[51] Consequently, the *Kimbrough* Court gave a great deal of deference to the well-reasoned explanation provided by the district court, which explained how the factors unique to Kimbrough's case rendered the sentence reasonable.[52] It was with this significant extension of district court discretion that the Supreme Court concluded the *Booker* line of cases. Unfortunately, *Rita*, *Gall*, and *Kimbrough* have largely left the courts of appeals to fend for themselves with respect to review for reasonableness.

II. REASONABLENESS REVIEW OF SENTENCING: WHERE DO FEDERAL COURTS OF APPEALS STAND?

Following the Supreme Court's decisions in *Booker*, *Rita*, *Gall*, and *Kimbrough*, several questions remain unanswered regarding reasonableness review. First, the Supreme Court has yet to adequately define the substantive reasonableness prong of the *Gall* test. Second, without a complete definition of substantive reasonableness, the courts of appeals have differed over how to apply the standard to district court sentencing determinations. Finally, those differences have been compounded by inconsistencies in *Gall* and *Kimbrough*, which have led to questions about the appropriate degree of deference to be given to sentencing determinations. These challenges have all hindered the development of a consistent and predictable system of appellate sentencing review and have contributed to the ongoing conflict between district court discretion and appellate review.

A. Reasonableness" Has yet to be Adequately Defined by the Supreme Court

Despite the Supreme Court's best efforts in *Booker*, *Rita*, *Gall*, and *Kimbrough* to clarify the scope and definition of reasonableness review, the courts of appeals remain unclear as to the exact test to be applied when conducting substantive reasonableness review.[53] This uncertainty is the result of the piecemeal definition

51. *Id.* at 110-11.
52. *Kimbrough*, 552 U.S. at 110-11.
53. Appleman, *supra* note 41, at 3.

of reasonableness that has developed since *Booker*, which is only applicable in limited circumstances.

First came *Rita*, which permitted appellate courts to presume that a within-Guidelines sentence was reasonable.[54] However, by definition, *Rita* only applies to those sentences imposed within the properly calculated Guidelines range.[55] For example, in 2009, within-Guidelines sentences accounted for almost fifty-seven percent of all sentences imposed, and *Rita* allowed those sentences to be presumed reasonable.[56] Unfortunately, *Rita* failed to address the forty-three percent of sentences that fell outside the advisory Guidelines range, all of which were consequently left subject to the indeterminate "reasonableness" standard announced in *Booker*.

Gall, on the other hand, announced that the abuse-of-discretion standard would apply to all sentences, not simply those that fall within the advisory Guidelines range. *Gall* also finally announced a concrete two-part test for determining whether a sentence was reasonable. The test did not define the contours of analysis for substantive reasonableness; it merely urged the courts to look to the "totality of the circumstances" when reviewing the sentence.[57] The lack of guidance provided by the *Gall* Court regarding substantive reasonableness has led some scholars to question the practicality of the reasonableness standard.[58] Their concern is that "reasonableness" and "abuse-of-discretion" are, in fact, two distinct standards of review, with "reasonableness" being a more specific (and more deferential) form of abuse-of-discretion review.[59] Despite the distinction, the *Gall* Court seemingly used both standards interchangeably to define appellate review of sentencing determinations.[60] Therefore, not only is the *Gall* test somewhat unclear, but the abuse-of-discretion standard that it

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54. *Rita*, 551 U.S. at 347.

55. *Id.* at 346.

56. *See* discussion *infra* Part III(A)(1) (discussing statistical evidence of district court sentencing practices).

57. *Gall*, 552 U.S. at 51.

58. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1. (2008). The authors note that "several circuits 'expressly employed an "abuse of discretion" analysis' as a proxy for reasonableness review" due to confusion over what the reasonableness standard meant, even before the Supreme Court adopted the reasonableness standard in *Booker*. *Id.* at 15. (quoting United States v. Ramirez-Rivera, 241 F.3d 37, 40 n.4 (1st Cir. 2001)).

59. Hessick & Hessick, *supra* note 58, at 17-18 (citing Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 4.21, at 4-135 (3d ed. 1999)).

60. *Gall*, 552 U.S. at 46 (citing *Booker*, 543 U.S. at 260-62).

defines may contradict the reasonableness standard adopted in *Booker*.

Finally, *Kimbrough* also increased the difficulty in defining reasonableness review by allowing a sentencing judge to depart from a Guidelines sentence based almost exclusively on a disagreement with the policy underlying the Guidelines.[61] The *Kimbrough* Court did not balance this increased discretion with heightened appellate scrutiny in all cases.[62] Therefore, the *Kimbrough* holding did very little to supplement the definition of reasonableness review; rather, it increased district court discretion while further curtailing the appellate courts' ability to keep that discretion in check.

Ultimately, it seems that the limited definition of reasonableness review outlined by the Supreme Court has created more questions than answers, particularly in the realm of substantive reasonableness. Despite these difficulties, it is important to keep in mind that, although the picture is incomplete, *Booker* and its progeny have built the foundations of a strong system of appellate review. This system, if followed, actually vests some discretion in the courts of appeals to prevent the unfettered use of discretion at the district court level.[63] Unfortunately, as will be seen in the next section, the courts of appeals have occasionally struggled to fill in the gaps left by the Supreme Court.

B. Confusion Among the Courts of Appeals

The confusion over what reasonableness means, particularly in the context of substantive reasonableness, has led the courts of appeals to take an ad hoc approach to sentencing review that gives varying degrees of deference to the sentencing court's determinations. The United States Court of Appeals for the Third Circuit has set forth one of the more striking examples of deference in *United States v. Tomko*.[64] In *Tomko*, the court defined substantive reasonableness analysis by stating that "if the district court's sentence is procedurally sound, [the court of appeals] will affirm it unless **no reasonable sentencing court** would have imposed the same sentence on that particular defendant for the reasons the district court provided."[65] While no other courts of appeals have

61. *Kimbrough*, 552 U.S. at 110-11.
62. This question will be explored more fully *infra* Part II(C)(2).
63. *See* discussion of guided discretion *infra* Part IV.
64. 562 F.3d 558 (3d Cir. 2009) (en banc).
65. *Tomko*, 562 F.3d at 568 (emphasis added).

explicitly adopted the *Tomko* "no reasonable judge" standard, others have emphasized the high degree of deference to be given to district court sentencing determinations.[66] The deference expressed by these courts appears to stem from language in *Gall* recognizing that "[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case."[67] Unfortunately, too much deference can lead courts of appeals to forget that they are very often the last line of defense against unwanted disparities in sentencing.[68]

At the other end of the spectrum are courts of appeals that review sentences with heightened scrutiny while still applying the abuse-of-discretion standard.[69] In *United States v. Pugh*,[70] the United States Court of Appeals for the Eleventh Circuit discussed how a reviewing court retains the discretion to closely scrutinize the weight given to the Section 3553(a) factors, and may remand for resentencing if the district court "has weighed the factors in a manner that demonstrably yields an unreasonable sentence."[71] In other cases, courts appear to have followed the dicta in both *Gall* and *Kimbrough* calling for increased scrutiny in certain circumstances.[72] These examples of heightened scrutiny appear to closely reflect pre-*Booker* sentencing practices, where district court judges had much less discretion, and appellate review was conducted under the de novo standard.[73] By engaging in such heightened review, these courts of appeals have indicated to the district

66. *See, e.g.*, United States v. Cavera, 550 F.3d 180, 189 (2d Cir. 2008). The *Cavera* court stated that "[w]e will . . . set aside a district court's *substantive* determination **only in exceptional cases** where the trial court's decision 'cannot be located within the range of permissible decisions.'" *Cavera*, 550 F.3d at 189 (citation omitted) (bold emphasis added). *See also* United States v. McBride, 511 F.3d 1293, 1297 (11th Cir. 2007) (noting that "[r]eview for reasonableness is deferential.").

67. *Gall*, 552 U.S. at 51 (internal quotation omitted).

68. *See* 18 U.S.C. § 3553(a)(6), *preempted in part by* Pepper v. United States, 131 S. Ct. 1229 (2011).

69. *See, e.g.*, *Tomko*, 562 F.3d at 578-79 (Fisher, J., dissenting); United States v. Taylor, 532 F.3d 68, 69-70 (1st Cir. 2008) (recognizing that although district courts are "empowered with considerable discretion in sentencing," recent Supreme Court decisions have also "underscored the importance of the district court's justifications" for sentencing decisions); United States v. Abu Ali, 528 F.3d 210, 265 (4th Cir. 2008) (noting that "[w]hile *Gall* assuredly made clear the limited and deferential role of appellate courts in the sentencing process . . . it was not a decision wholly without nuance or balance.").

70. 515 F.3d 1179, 1191 (11th Cir. 2008).

71. *Pugh*, 515 F.3d at 1191.

72. *E.g.*, *Taylor*, 532 F.3d at 69-70.

73. *Booker*, 543 U.S. at 261.

courts that unfettered discretion will be met with increased appellate scrutiny.[74]

The cases discussed above illustrate the broad range of deference that courts of appeals accord district court sentencing determinations under the auspices of reasonableness review. Despite the inconsistencies, courts of appeals often give great weight to the district court's thorough explanation of the reasons underlying the sentencing determination.[75] This reliance on the district court's explanation gives the court of appeals a concrete ground on which to base its reasonableness review, and allows for increased transparency in the sentencing process. Until courts have developed a more robust body of sentencing law, reliance on the district court's explanation may be an astute exercise of appellate court discretion that will ultimately help to push this area of law forward and keep district courts from exercising unfettered discretion.

C. Inconsistencies in Both Gall and Kimbrough

Beyond the insufficient definition of reasonableness review and the resulting confusion, courts of appeals have also struggled to reconcile inconsistent language in *Gall* and *Kimbrough*. In both cases, the Supreme Court instructed the courts of appeals to give great deference to district court sentencing determinations,[76] while at the same time, dicta in each case implied that heightened review might be appropriate in certain circumstances.[77] Although these inconsistencies evidence an attempt to reconcile sentencing court discretion with consistent appellate review, that attempt has largely resulted in more confusion over what reasonableness review might actually entail.[78]

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74. *See* discussion of guided discretion *infra* Part IV(A)(2).

75. *See, e.g.*, United States v. Lychock, 578 F.3d 214 (3d Cir. 2009). The *Lychock* court concluded that "by ignoring relevant factors and failing to offer a **reasoned explanation** for its departure from the Guidelines, the District Court once again 'put at risk the substantive reasonableness of any decision it reached.'" *Lychock*, 578 F.3d at 220. (emphasis added) (quoting United States v. Goff, 501 F.3d 250, 256 (3d Cir. 2007)); United States v. García-Carrasquillo, 483 F.3d 124, 132 (1st Cir. 2007) (finding a one-sentence explanation to be insufficient, even in light of that court's practice of "go[ing] to great lengths to infer the district court's reasoning from the record[.]"); United States v. Goffi, 446 F.3d 319, 321-22 (2d Cir. 2006) (finding that the district court's verbal explanation, while brief, was sufficient under § 3553(c), but remanding to allow for a more thorough written explanation for the sentencing departure).

76. *Gall*, 552 U.S. at 51. *See Kimbrough*, 552 U.S. at 110-11.

77. *See* Hessick & Hessick, *supra* note 58, at 34.

78. Hessick & Hessick, *supra* note 58, at 34.

1. *Gall and Proportionality Review*

In *Gall*, the Supreme Court held that courts of appeals must review all sentences under the abuse-of-discretion standard,[79] indicating that sentencing review should be extremely deferential.[80] Nevertheless, the Court also indicated that it "find[s] it uncontroversial that a major departure [from the Guidelines] **should be supported by a more significant justification than a minor one.**"[81] The Court also added that "a district judge must give serious consideration to the extent of any departure from the Guidelines and **must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.**"[82] Ultimately, this dicta requiring a more significant justification appears to contradict the language in both *Booker* and *Gall* requiring all sentencing determinations to be reviewed for reasonableness under the deferential abuse-of-discretion standard.

In one example of the resulting confusion, the United States Court of Appeals for the Eighth Circuit explicitly rejected strict proportionality review, but has continued to employ "heightened" review since *Gall* was decided.[83] Therefore, the language in *Gall* appears to have left the door open for courts of appeals to continue requiring more substantial justifications for outside-Guidelines sentences, albeit not rising to the level of strict proportionality review. As will be discussed *infra*, this heightened review may be necessary to control newfound district court discretion and to prevent undesirable disparities in sentencing.

2. *Kimbrough's "Closer Review" Dictum*

Kimbrough also contains inconsistent language that has caused confusion over what degree of deference should be given to a sentencing judge's policy disagreement with certain Guidelines sentences. In *Kimbrough*, the Supreme Court recognized that appellate courts should defer to a district court's policy disagreement

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79. *Gall*, 552 U.S. at 51.

80. *But cf. id.* (noting that even if the appellate court would have arrived at a different sentence, that is not sufficient to justify reversal of the district court).

81. *Id.* at 50 (emphasis added).

82. *Id.* at 46 (emphasis added).

83. *Compare* United States v. Lehmann, 513 F.3d 805, 808-09 (8th Cir. 2008) (noting the "impermissibility" of "'proportionality' review"), *with* United States v. Austad, 519 F.3d 431, 434-35 (8th Cir. 2008) (explicitly employing proportionality review and citing cases that have done the same).

with the advisory Guidelines range.[84] However, the Court also noted in dicta that "**closer review** may be in order" when the sentencing judge varies a sentence based solely on such policy disagreements.[85] This contradiction appears to force appellate courts to choose between two different standards of review: abuse of discretion for sentences based on case-specific facts; and "closer review" for sentences imposed outside the Guidelines range for purely policy reasons.[86] Several problems have stemmed from this contradictory language.

The first problem is the question of which sentences (besides those imposed pursuant to the crack Guideline) might be subject to *Kimbrough*'s "closer review" requirements.[87] When faced with a new policy disagreement, courts of appeals have addressed this problem in different ways: some have carefully scrutinized the Sentencing Commission's role in formulating the Guideline in question, and have only employed closer review in situations analogous to the crack cocaine Guideline.[88] Others have employed closer review and found the policy disagreement insufficient to justify a below-Guidelines sentence.[89] Finally, still others have acknowledged the closer review requirement, but have not firmly resolved which Guidelines (besides the crack cocaine Guideline) should be subject to it.[90] In these situations, courts are often split over whether the underlying facts allow for application of the *Kimbrough* rule, and by extension, whether those sentences should then be subject to closer review.

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84. *Kimbrough*, 552 U.S. at 110-11.

85. *Id.* at 89 (citing *Rita*, 551 U.S. at 351) (emphasis added).

86. Hessick & Hessick, *supra* note 58, at 34.

87. Hessick & Hessick, *supra* note 58, at 34.

88. *E.g.*, United States v. Arrelucea-Zamudio, 581 F.3d 142, 143 (3d Cir. 2009) (extending the reasoning in *Kimbrough* to include sentence variances based on the disparity between fast-track and non-fast-track judicial districts); United States v. Friedman, 554 F.3d 1301, 1311 n.13 (10th Cir. 2009) (finding that the career offender Guideline was not like the crack Guideline because it was adopted at the "express direction of Congress" and was therefore not subject to policy disagreement under *Kimbrough*).

89. *E.g.*, United States v. Irey, 612 F.3d 1160, 1203 (11th Cir. 2010) (finding that a below-Guideline sentence for a convicted pedophile was unreasonable because the Guideline sentence was not "too harsh" considering the harm that such crimes cause).

90. *E.g.*, *Cavera*, 550 F.3d at 192 (finding that the court does not "take the Supreme Court's comments concerning the scope and nature of 'closer review' to be the last word on these questions."); *see also* Hessick & Hessick, *supra* note 58, at 36 n.179 (citing United States v. Grossman, 513 F.3d 592, 597 (6th Cir. 2008)).

i. Specific Instances Questioning Kimbrough's Applicability

One type of case where courts are conflicted involves "fast-track" early disposition sentencing programs in which immigration defendants can receive reduced sentences by pleading guilty and waiving their rights to appeal and to certain post-conviction relief. Since only a small percentage of judicial districts have fast-track programs, there is the potential for disparate sentences depending on where a defendant is sentenced.[91] In *United States v. Arrelucea-Zamudio*, for example, the United States Court of Appeals for the Third Circuit extended *Kimbrough*'s reasoning by analogy to include policy disagreements with the sentencing disparity between fast-track and non-fast-track disposition of illegal reentry cases.[92] The court reasoned that sentencing judges have the discretion to consider all of the Section§ 3553(a) factors together and that fact may account for the disparity created by fast-track programs in the sentencing determination.[93] Furthermore, the court rejected the contention that district judges should focus almost entirely on Congress' intent in creating the programs, rather than on the Section 3553(a) factors as a whole.[94] The United States Courts of Appeals for the First, Sixth, and Seventh Circuits have followed suit.[95]

On the other hand, the United States Courts of Appeals for the Fifth, Ninth, and Eleventh Circuits have refused to allow variances based on policy disagreements with the fast-track disparity on the grounds that such variances would contravene the congressional policy of creating fast-track programs, as expressed in the PROTECT Act.[96] Rather than focusing on judicial discretion to

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91. *Arrelucea-Zamudio*, 581 F.3d at 146 (citing U.S. DEP'T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, MEMORANDUM OF DEP'T OF JUSTICE, *Reauthorization of Early Disposition Programs* (Feb. 1 2008), http://www.fd.org/pdf_lib/Fast_Track_Reauthorization08.pdf (last visited Mar. 7, 2011)); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2010).

92. 581 F.3d at 143.

93. *Id.* at 149.

94. *Id.*

95. *See* United States v. Reyes-Hernandez, 624 F.3d 405, 417-18 (7th Cir. 2010); United States v. Camacho-Arellano, 614 F.3d 244, 248-49 (6th Cir. 2010); United States v. Rodriguez, 527 F.3d 221, 231 (1st Cir. 2008).

96. *See* United States v. Gonzalez-Zotelo, 556 F.3d 736, 741 (9th Cir. 2009); United States v. Vega-Castillo, 540 F.3d 1235, 1238-39 (11th Cir. 2008); United States v. Gomez-Herrera, 523 F.3d 554, 559 (5th Cir. 2008); *see also* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT), Pub. L. No. 108-21, 117 Stat. 650 (2003).

disagree with the Guidelines, these courts have focused on the expressed congressional intent as a way to distinguish the fast-track disparity from the crack/powder disparity addressed in *Kimbrough*.[97] By doing so, these courts have essentially given greater weight to consideration of Section 3553(a)(5) rather than seeking a balanced consideration of the Section 3553(a) factors as a whole.

Another area in which courts of appeals have been divided over *Kimbrough*'s applicability is child pornography.[98] Since *Kimbrough*, several district courts have noted that, similar to the crack cocaine guideline, the child pornography and child exploitation Guidelines should not be entitled to as much judicial deference, since they lack the level of empirical support and Sentencing Commission expertise found in most other Guidelines.[99] Consequently, the United States Court of Appeals for the Second Circuit has questioned the reliability of the child pornography Guidelines, noting how in some cases the "run-of-the-mill" Guidelines sentence for possession of child pornography can actually exceed the sentence for illegal sexual conduct with a child.[100] Likewise, the United States Court of Appeals for the Third Circuit has extended *Kimbrough* to include policy disagreements in a child pornography case as well.[101]

Nevertheless, other courts have taken a different approach by deferring to Congress' intent, based on the number of legislative changes that have been made to the child pornography and exploitation Guidelines. For example, the United States Court of Appeals for the Sixth Circuit has indicated that it will not allow sentencing courts to reject the child pornography Guidelines based on a *Kimbrough*-like policy disagreement, noting that "it is unquestionably Congress' constitutional prerogative to issue sentencing

97. United States v. Gonzalez-Zotelo, 556 F.3d 736, 741 (9th Cir. 2009); United States v. Vega-Castillo, 540 F.3d 1235, 1238-39 (11th Cir. 2008); United States v. Gomez-Herrera, 523 F.3d 554, 559 (5th Cir. 2008).

98. *See* Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After* Kimbrough, 93 MARQ. L. REV. 717, 735-36 (Winter 2009).

99. *See* United States v. Huffstatler, 571 F.3d 620, 622-23 (7th Cir. 2009) (citing United States v. Shipley, 560 F. Supp. 2d 739, 744-46 (S.D. Iowa 2008); United States v. Hanson, 561 F. Supp. 2d 1004, 1008-12 (E.D. Wis. 2008); United States v. Baird, 580 F. Supp. 2d 889, 894-96 (D. Neb. 2008); United States v. Grober, 595 F. Supp. 2d 382, 412 (D. N.J. 2008)).

100. United States v. Dorvee, 616 F.3d 174, 186-88 (2d Cir. 2010) (rejecting a sentence as unreasonable and explicitly extending the *Kimbrough* rule to include the child pornography Guideline).

101. United States v. Grober, 624 F.3d 592, 608-09 (3d Cir. 2010) (relying on the reasoning in *Arrelucea-Zamudio* to extend *Kimbrough* to include the child pornography guideline).

directives."[102] These splits exemplify how *Kimbrough* has added to the confusion among the courts of appeals by raising questions about how far district courts may extend their discretion before the courts of appeals must respond by exercising greater scrutiny of those decisions.

3. *Post-Kimbrough Deference: De Novo Review of Policy Determinations*

Assuming that courts are free to expand *Kimbrough*'s reasoning to include policy disagreements with other Guidelines, other questions remain regarding what "closer review" might entail in those cases. By giving district court judges the discretion to categorically disregard the crack, fast-track, and child pornography Guidelines, some have argued that district judges are now essentially making policy judgments without being subjected to adequate appellate review. As described by Professors Hessick and Hessick:

> [a]fter *Kimbrough*, district courts have the power to make policy determinations about how long a sentence should be for a particular crime in the average case. Such a determination sets forth a general rule, independent of specific facts, for the amount of punishment that should be meted out for a particular crime. Because they are legal determinations, these policy determinations would ordinarily be subject to de novo review, not the deferential [abuse-of-discretion] standard . . . .[103]

The question thus becomes whether the "closer review" called for by *Kimbrough* should actually be read as requiring de novo review of any policy disagreements that sentencing courts may have, since policy determinations, as legal conclusions, are generally subject to de novo review.[104] After *Booker*, at least one court of appeals openly engaged in de novo review of a district court's weighing of the Section 3553(a) factors,[105] but that decision was later vacated by the Supreme Court as being in violation of the Court's holding in *Gall*.[106]

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102. United States v. McNerney, No. 09-4011, 2011 WL 691178, at *4 (6th Cir. Mar. 1, 2011).

103. Hessick & Hessick, *supra* note 58, at 27.

104. *Id.* at 26-27.

105. *See* United States v. Smart, 518 F.3d 800, 806 (10th Cir. 2008) (citing United States v. Garcia-Lara, 499 F.3d 1133, 1137 (10th Cir. 2007), *vacated by* Garcia-Lara v. United States, 553 U.S. 1016 (2008)).

106. *Garcia-Lara*, 553 U.S. 1016.

Courts of appeals appear to be unable to engage in de novo review because of the explicit directives in both *Booker* and *Gall* to review sentence determinations under the deferential abuse-of-discretion standard.[107] Indeed, *Gall* flatly rejected the requirement of de novo review for sentencing variances.[108] Long-standing Supreme Court jurisprudence holds that although sentencing departures may occasionally call for legal determinations, courts cannot label some parts of the review de novo while labeling other parts abuse of discretion.[109] Furthermore, rejecting the de novo standard in sentencing cases is consistent with the general trend in post-*Booker* Supreme Court jurisprudence that has consistently increased district court discretion at the expense of appellate court scrutiny.

Nevertheless, although *Booker* and its progeny have certainly diluted the courts of appeals' ability to exercise heightened review of sentencing determinations, that ability has not been completely stripped away. Indeed, in light of district courts' increased ability to make policy determinations, it is imperative that the courts of appeals be able to balance that discretion with heightened scrutiny of sentencing decisions. Therefore, the courts of appeals must begin employing the "closer review" called for by *Kimbrough* and by seeking out "more substantial justification[s]" as permitted by *Gall* when district courts impose sentences that are outside of the Guidelines range. The United States Court of Appeals for the Tenth Circuit explicitly recognized this need in *Smart*.[110] The courts of appeals must particularly embrace the dicta in *Kimbrough* and *Gall* in those close cases cited above, where district courts use their newfound discretion to grant a variance based on a *Kimbrough*-like policy disagreement. By carefully engaging in "closer review," courts of appeals will be able to keep a close eye on district court discretion, thus guarding against unwarranted disparities in sentencing.

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107. *E.g.*, United States v. Wise, 515 F.3d 207, 217 n.5 (3d Cir. 2008) (recognizing that "not all issues that may be raised on appeal can be neatly separated into the categories of 'fact' and 'law.' . . . [W]e must review the district court's decision under 'the familiar abuse-of-discretion standard.'").

108. *Gall*, 552 U.S. at 59.

109. Koon v. United States, 518 U.S. 81, 100 (1996), *superseded by statute on other grounds*, 18 U.S.C. § 3742(e) (2003), *as stated in* Owner-Operator Indep. Drivers Ass'n, Inc. v. Landstar Sys., Inc., 622 F.3d 1307, 1324 (11th Cir. 2011).

110. *Smart*, 518 F.3d at 807 (noting that the dicta in *Gall* and *Kimbrough* are still useful when a court of appeals makes an "individual assessment" of the district court sentencing decision).

Ultimately, the challenges facing the courts of appeals in the wake of *Rita*, *Gall*, and *Kimbrough* are substantial. In light of these difficulties, it is unsurprising that the courts of appeals have split on several important legal questions. Nevertheless, some district courts continue to freely exercise their broad new discretion, seemingly without regard for the potential consequences to the larger body of sentencing law.

III. STATISTICAL ANALYSIS OF *BOOKER* AND ITS PROGENY: GIVEN DISTRICT COURTS' NEW DISCRETION IN SENTENCING, WHAT HAS CHANGED?

Statistics collected by the United States Sentencing Commission have revealed surprising things about the sentencing practices at both the district court and court of appeals levels. Based on this data, district courts seem to be exercising their newfound discretion in earnest, resulting in a substantial increase in the number of outside-Guidelines sentences imposed since *Booker*. At the court of appeals level, the statistics indicate that courts have largely returned to pre-*Booker* rates of affirmance, and defendants do not seem any more likely to appeal their sentences as a result of *Booker*. Therefore, the statistics seem to suggest that the confusion facing the courts of appeals regarding substantive reasonableness may not be as significant as some have feared, while concerns about district court sentencing disparities may pose a real problem.

A. *Pre-Booker and Post-Booker Trends in District Court Sentencing Decisions*

1. *Within-Guidelines Sentences*

In 2004, the year before *Booker*, 71.8 percent of all federal defendants were sentenced within the applicable Guidelines range.[111] That number dropped more than ten percentage points in 2006.[112] In the years since *Booker*, between 2006 and 2009,[113]

111. *Percent of Offenders Receiving Each Type of Departure—Figure G*, U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2007/SBTOC07.htm [hereinafter 2007 SOURCEBOOK].

112. *Percent of Offenders Receiving Each Type of Departure—Figure G*, U.S. SENTENCING COMMISSION, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/SBTOC09.htm [hereinafter 2009 SOURCEBOOK].

the percentage of within-Guidelines sentences has continued to fall, from 61.6 to 56.8 percent.[114] All told, the total number of within-Guidelines sentences has dropped by fifteen-percentage points since 2004. This change is certainly significant and represents an abrupt shift in sentencing practices coinciding with the *Booker* decision. In fact, the ten-percentage point drop between 2004 and 2006 is the sharpest decline in all the years of available statistics. This seems to indicate that *Booker* and its progeny have encouraged district judges to vary from the Guidelines with increased frequency since 2006.

However, before these statistics cause too much alarm, it should be noted that historical trends do indicate that the percentage of within-Guidelines sentences has dropped significantly at other times as well. For instance, between 1990 and 2001, the percentage of within-Guidelines sentences fell from 83.4[115] to 64 percent,[116] representing a decrease of 19.4 percentage points. Therefore, courts have significantly changed their sentencing practices in the past. Needless to say, although past changes have been significant, they occurred over a much longer period of time than the shift following *Booker*. Consequently, although sentencing practices seem to have changed largely within the bounds of historical trends, courts have never before caused such a drastic shift in sentencing practices in such a short period of time.

The decrease in within-Guidelines sentences has also corresponded to a nearly identical increase in below-Guidelines sentences. The most significant change took place between 2004 and 2006, when the number of below-Guidelines sentences nearly tri-

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113. Although the U.S. Sentencing Commission does compile quarterly reports of sentencing statistics, they are not to be treated as final until they are compiled into the annual sourcebook. *See* U.S. SENTENCING COMMISSION, PRELIMINARY QUARTERLY DATA REPORT 2 (Sept. 30, 2010), http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2010_Quarter_Report_4th.pdf. Consequently, 2009 is the most recent year for which Sourcebook data is available. Furthermore, statistics for fiscal year 2005 have been omitted from this analysis due to the significant aberrations created by *Booker*.

114. 2009 SOURCEBOOK, *supra* note 112.

115. *Percent of Offenders Receiving Each Type of Departure—Figure G*, U.S. SENTENCING COMMISSION, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/1996/fig-g.pdf [hereinafter 1996 SOURCEBOOK].

116. *Percent of Offenders Receiving Each Type of Departure—Figure G*, U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2001/fig-g.pdf [hereinafter 2001 SOURCEBOOK].

pled, from 4.6 percent before *Booker* to 12.1 percent after.[117] Furthermore, that number continued to increase to sixteen-percent in 2009.[118] Another increase came in the number of above-Guidelines sentences. Since 2004, the number of defendants receiving above-Guidelines sentences has more than doubled, from 0.6 percent before *Booker* to 1.6 percent in 2006.[119] Furthermore, that percentage has remained more than double its pre-*Booker* level through 2009.[120] Ultimately, these statistics strongly indicate that district judges have been exercising their newfound discretion to impose more sentences outside the Guidelines, but as we will see, this nationwide shift in sentencing patterns has also had a significant impact on sentencing disparities at the individual level.

2. *Inter-Judge Sentencing Disparity*

In addition to the broad nationwide changes in sentencing habits, there have been many anecdotal reports of significant disparities in sentences imposed by different judges at the district court level.[121] In late 2010, Professor Ryan Scott conducted an empirical study of judges' sentencing habits in the United States District Court for the District of Massachusetts, revealing shocking evidence of inter-judge sentencing disparities. Ultimately, Professor Scott concluded that individual sentencing judges have a tremendous effect on sentencing disparities, and their influence over sentence length has continued to increase since *Booker*.[122] The most striking data to emerge from Professor Scott's study illustrates the average degree of variance from the Guidelines range in the wake of *Booker*, *Gall* and *Kimbrough*.[123] The data reveals that after *Booker*, average sentences in the District of Massachusetts varied by up to a year and a half, depending on which judge imposed the sentence.[124] This data seems to confirm fears that individual judges may be using their newfound discretion to impose more disparate sentences. Although Professor Scott's study is interesting and potentially sheds light on a serious problem, the results

117. 2007 SOURCEBOOK, *supra* note 111.
118. 2009 SOURCEBOOK, *supra* note 112.
119. 2007 SOURCEBOOK, *supra* note 111.
120. 2009 SOURCEBOOK, *supra* note 112.
121. Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1, 3 (2010).
122. *Id.* at 30.
123. *Id.* at 38-39.
124. *Id.*

are far from conclusive considering that he only had access to data from one district court. Additionally, the disparities may reflect factors unique to the individual defendants, as opposed to simply a cavalier attitude toward sentencing. Until more data becomes available, Professor Scott's study nevertheless seems to be in line with the results on the national level, which indicates that district judges have been imposing increasingly disparate sentences.[125]

B. Statistics Related to Appeals

Two sets of statistics at the appellate level also reflect surprising results since *Booker*. The first set demonstrates that *Booker* seems to have had little effect on defendants' decisions to appeal their sentence, despite the evidence of confusion amongst the courts of appeals regarding post-*Booker* reasonableness review. The second set reveals that the appellate courts are also affirming sentences at approximately the same rate as before *Booker*, leading to the conclusion that the courts of appeals are beginning to develop a more consistent body of sentencing law.

1. Number of Appeals

Since 1996, the number of appeals involving sentencing issues has generally increased, with the largest single-year jump actually occurring between 2000 and 2001, when sentence-only appeals increased from 40.9 to fifty-one percent of all appeals.[126] Overall, the lowest number of sentences appealed occurred in 1996, when only 38.5 percent of all appeals were for sentences only, compared to a high of sixty percent in 2006, the year after *Booker*. This increase in sentence appeals seems to be a part of a larger trend, probably unrelated to *Booker*, of defendants being more likely to appeal their sentences in recent years.

Although sentence-only appeals have remained relatively consistent, sentence and conviction appeals[127] dramatically increased between 2004 and 2006. In that time, the number of sentence and

125. *See* discussion *supra* Part III(A).

126. App'x 1. The Sentencing Commission Sourcebooks categorize appeals statistics according to three categories: sentence-only appeals, conviction-only appeals, and those that appeal both conviction and sentence. Except where indicated, all statistics provided in this section refer to the sentence-only appeals. Likewise, all appellate review statistics refer to affirmance rates of sentencing appeals. For a comparison between sentence-only appeals and appeals involving both sentencing and conviction issues see App'x 1.

127. This includes both sentencing-only appeals and appeals of both sentences and convictions. App'x 1.

conviction appeals jumped from sixty-nine to 83.6 percent.[128] This increase of 14.6 percentage points probably reflects the uncertainty surrounding the *Booker* decision, which may have encouraged defendants who appealed their conviction to appeal their sentence as well. Despite the jump, it is equally surprising how quickly the number of these appeals has returned to pre-*Booker* ranges. By 2008, the number of sentencing and conviction appeals fell from 83.6 to 72.9 percent, close to the historical average rate of 69.8 percent.[129] Therefore, although *Booker* had a brief impact on the number of sentence and conviction appeals, larger historical trends reveal that its overall impact on the number of appeals has been minimal.

2. *Percentage of Appeals that are Affirmed*

More surprisingly, *Booker* has not had a significant impact on the rate at which sentences are affirmed on appeal. Prior to *Booker* in 2004, the courts of appeals nationwide affirmed 79.5 percent of all sentence appeals.[130] In 2006, that number had decreased to 67.8 percent.[131] This decline in affirmances presumably reflects appellate courts' tendency to carefully scrutinize sentencing decisions after the Guidelines were declared advisory. However, the courts have once again self-corrected, and affirmances have steadily risen from seventy-nine percent in 2007 to 80.8 percent in 2008 and finally to 82.9 percent in 2009.[132] This rebound puts the 2009 statistics only slightly above the historical average of 77.1 percent.[133] Additionally, the slight increase in affirmances since *Booker* should come as no surprise in light of the increased appellate deference called for by *Rita*, *Gall*, and *Kimbrough*. Ultimately, despite confusion regarding reasonableness review, it appears as though the courts of appeals have naturally returned to their historic rates of affirmance, albeit with a slight increase attributable to evolving Supreme Court jurisprudence.

In the six years since *Booker*, the sentencing statistics compiled by the United States Sentencing Commission paint an interesting picture. Despite drastic changes in district court sentencing rates and fears of wide sentencing disparities, the courts of appeals

128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. App'x 1.
133. *Id.*

have largely returned to pre-*Booker* sentencing practices, with minor adjustments to account for *Rita*, *Gall*, and *Kimbrough*. Nevertheless, the cases indicate that the courts of appeals remain uncertain about the proper scope of reasonableness review, raising the question of where the federal courts go from here.

IV. GOING FORWARD: SENTENCING IN THE NEW POST-KIMBROUGH WORLD

Many questions remain following *Booker* and its progeny, and the cases and statistics make it difficult to see whether sentencing at either the district court or court of appeals levels has become any clearer. Given these challenges, federal courts must continue to develop a new approach to sentencing, one that balances district court discretion and consistent appellate review, while still respecting the interests of Congress in the sentencing process and developing a more coherent body of federal sentencing law.

A. Possible Solutions for the Federal Judiciary

Many scholars have suggested ways that the federal judiciary can improve in the years ahead. Among the suggestions are calls to "let the guidelines be guidelines,"[134] and to encourage the development of a federal "common law" of sentencing.[135] Guided discretion also calls upon judges at both levels to exercise their discretion within reasonable bounds and to be mindful of the role that the courts should play in the larger federal system.[136] By building on these ideas and incorporating them into federal sentencing practice, district courts and courts of appeals will be better suited to address post-*Booker* sentencing with more consistency and predictability, possibly without the need for further Supreme Court guidance.

1. Guided Discretion at the District Court Level

District court judges face the first hurdle in sentencing: selecting an appropriate sentence that accounts for factors unique to the individual defendant, yet respects the Guidelines and the need for

134. Gerard E. Lynch, *Letting Guidelines Be Guidelines (And Judges Be Judges)*, OHIO STATE JOURNAL OF CRIMINAL LAW *AMICI* BLOG, (Dec. 28, 2008), http://moritzlaw.osu.edu/osjcl/blog/Articles_1/Lynch-final-12-28-07.pdf.

135. Appleman, *supra* note 40, at 4.

136. *See* Fisher, *supra* note 5, at 88-89.

congressional involvement in sentencing determinations. To accomplish this, I have suggested that district courts rely on the factors set forth in Section 3553(a), as both Congress and the Supreme Court have instructed.[137] This practice fits into the larger post-*Booker* sentencing paradigm set forth by the United States Court of Appeals for the Third Circuit in *United States v. Gunter*.[138] *Gunter* instructs district courts to follow a three-step sentencing process, requiring them to (1) calculate defendants' Guideline sentences as was required before *Booker*; (2) formally rule on both parties' motions and declare whether a variance will be granted; and finally, (3) consider all relevant Section 3553(a) factors.[139] Guided discretion is most important at step three, where Section 3553(a)'s subparts can be divided into those factors that allow for discretion, and those that require the sentencing judge to consider congressional interests.

i. Discretionary Factors

Factors one, two, three and seven[140] allow sentencing judges to exercise a great deal of discretion that would otherwise not exist in a mandatory-Guidelines world. Factor one allows the judge to consider facts unique to the case, including the defendant's "history and characteristics" such as age, education, vocational skills, mental and emotional condition, physical condition, employment, and family and community ties.[141] These factors are not included as part of the Guidelines considerations, but can certainly help to determine the most appropriate sentence for individual offenders.[142]

Factor two allows the sentencing judge to consider the various purposes of sentencing and how they are best served in each case.[143] The purposes to be considered at this step are retribution, deterrence, protection of the public, and rehabilitation.[144] Once again, these factors help the sentencing judge to tailor each sentence to the individual characteristics of the defendant and his or

137. *See* 18 U.S.C. § 3553(a)(1)-(7).
138. 462 F.3d 237 (3d Cir. 2006).
139. *Gunter*, 462 F.3d at 247.
140. Although the need for restitution embodied in Section 3553(a)(7) certainly reflects a discretionary determination made by the sentencing judge, it is not a factor that I take up in great detail here.
141. 18 U.S.C. § 3553(a)(1).
142. *See* Fisher, *supra* note 5, at 71, 84-85, 90-91.
143. 18 U.S.C. § 3553(a)(2).
144. *Id.* at (A)-(D).

her offense. For example, if a judge believes that a defendant would be most helped by a sentence focusing on treatment and rehabilitation, factor two gives the judge discretion to emphasize these goals. On the other hand, if a judge believes that a defendant poses a particularly acute risk of danger to others in the community, he or she may adjust the sentence by weighing that consideration accordingly.

Finally, factor three enhances district judges' discretion by allowing them to consider what kinds of sentences—prison, fines, home detention, etc.—are available for each crime.[145] This discretion allows the judge to fashion a sentence that properly reflects the determinations made in factors one and two. As noted above, the offender that poses a risk to the community may face a longer term of imprisonment based on the analysis at factor three. Taken as a whole, factors one through three encourage judges to use their discretion and to consider many factors that would otherwise be left out of the sentencing process, yet might have a significant impact on the resulting sentence.

ii. Congressional Considerations

Factors four, five and six require the sentencing judge to set aside some discretion and to consider the significant legislative interest in sentencing decisions. Factor four is perhaps the most controversial, since it requires the district court to take into account the advisory Guidelines sentence.[146] Although the Guidelines are no longer mandatory, they reflect a process of careful deliberation by the Sentencing Commission that takes into consideration the goals of sentencing set forth by Congress, pertinent policy statements, and years of sentencing practice.[147] This process ultimately produces a Guideline range that generally fulfills the requirements of Section 3553(a) in the "mine run" of cases.[148]

However, it is also important to note that the district court need not actually impose a within-Guidelines sentence; rather, the advisory sentence must be considered along with all of the Section 3553(a) factors in order to arrive at a well-reasoned sentence.[149] Therefore, most of judges' post-*Booker* discretion now exists because they may disregard factor four. Despite this new discretion,

145. 18 U.S.C. § 3553(a)(3).
146. *See Booker*, 543 U.S. at 259-60.
147. *See Rita*, 551 U.S. at 350-51.
148. *Id.* at 351.
149. *Gall*, 552 U.S. at 49-50.

Judge Gerard E. Lynch of the United States District Court for the Southern District of New York has emphasized the importance of the advisory sentence by recognizing that the Commission is better suited to "weighing broad social policy" and responding to "democratic political opinion."[150] This perspective on district court deference serves as a potent counterpoint to those judges who may seek to use increased discretion as an excuse to sentence without regard for the Guidelines. Although Judge Lynch urges his fellow judges to "treat the Guidelines as *guidelines*, and not as a straightjacket," he still recognizes the importance of the Commission's expertise as embodied by the Guidelines.[151] Furthermore, by carefully considering the advisory Guideline sentence, judges will not only be helped along in the sentencing process, but they can also benefit by having a stronger basis for their sentencing decision should it be appealed. However, in those cases where a district court chooses to exercise its discretion and impose a sentence outside of the Guidelines range, the judge must also remember that he or she may still be subject to "closer review" or be expected to provide a "more significant justification" to support that decision. Thus, it is imperative that district courts calculate and carefully consider the advisory Guidelines sentence as part of the sentencing process, even in the wake of *Booker*.[152]

Factor five explicitly requires sentencing judges to consider the legislative interest in the sentencing process in the form of policy statements contained in the Guidelines.[153] These policy statements are an integral part of the sentencing process, but their role has changed significantly following the Supreme Court's decision in *Kimbrough*, which allows judges to actively disagree with the Guidelines' policy determinations.[154] The policy statements now act as a foil for district judges, who must still consider the statement even though he or she might ultimately choose to disagree with it. Furthermore, the judge must then go on to frame his or her sentence "in line" with the other Section 3553(a) factors.[155] This is particularly important when a judge chooses to disregard a

150. Lynch, *supra* note 132, at 5.

151. Lynch, *supra* note 132, at 1.

152. *See* Fisher, *supra* note 5, at 94 (noting that "every court of appeals to have considered the question has required that district courts properly calculate a defendant's advisory Guidelines range as part of a proper sentencing determination"); *see also* Fisher, *supra* note 5, at 94 n.151 (citing authority from circuit courts of appeals from across the country).

153. 18 U.S.C. § 3553(a)(5).

154. *See Kimbrough*, 552 U.S. at 110-11.

155. *Id.* at 111.

Guidelines policy statement because it will provide support for the sentencing decision under the closer scrutiny at the appellate level. Thus, although *Kimbrough* allows district judges to disregard a policy statement, they must still consider those policy statements as a part of the larger sentencing process in order to conclude that a different sentence would best suit a particular defendant.

Finally, factor six has become particularly important since *Booker* because it requires district courts to minimize sentencing disparities, despite their newfound discretion.[156] Sentencing statistics reveal that this concern may be very real, as sentencing disparities have generally increased since *Booker*. Needless to say, the exercise of guided discretion requires that district courts maintain a uniform system of sentencing, even without mandatory sentencing Guidelines. Therefore, district judges must consider disparity as part of the sentencing procedure, and must remember that uniform sentencing is a goal for both Congress and the Sentencing Commission. Failure to consider sentencing disparities can lead to reversal on appeal as courts of appeals employ closer scrutiny or require heightened justifications. Additionally, if district courts fail to keep sentencing disparities in check, they risk the very real possibility of legislative backlash in the form of new sentencing legislation that will take back the discretion granted in *Booker*.[157]

Ultimately, guided discretion seeks a balance between discretion and uniformity that requires the district court to account for the defendant's needs, the Sentencing Commission's expertise, and Congress' interests. This complex balancing requires serious consideration of all the Section 3553(a) factors and a thorough explanation of the resulting sentence. Perhaps more importantly, such balancing requires an understanding that discretion is to be used only when necessary, as part of the larger sentencing process set forth in *Gunter*. By following this approach, district court judges will provide a strong foundation for equally well-reasoned and consistent appellate review.

2. Guided Discretion at the Appellate Level

Guided discretion also requires the courts of appeals to rely on the existing Supreme Court paradigm established in *Rita*, *Gall*,

156. 18 U.S.C. § 3553(a)(6).
157. *See* Fisher, *supra* note 5, at 87-88.

and *Kimbrough* as the starting point for all appellate review of sentences. After *Gall*, the courts of appeals have a general framework for sentencing review that requires analysis for both procedural and substantive reasonableness.[158] The courts of appeals should have little difficulty applying the procedural prong of the *Gall* test to determine whether the district court properly calculated the Guidelines range, took into account all of the Section 3553(a) factors, and sufficiently explained the resulting sentence. By strictly enforcing these procedural requirements, the courts of appeals will have a uniform basis on which to determine whether many sentences are reasonable.

Once a sentence has been found to be procedurally reasonable, the courts of appeals must then apply the substantive reasonableness prong of the *Gall* test. If courts apply the rules set forth in *Rita* and *Kimbrough*, many of the difficulties with substantive reasonableness may never materialize. For example, since within-Guidelines sentences have accounted for more than half of all sentences imposed since *Booker*,[159] a majority of sentences could be declared substantively reasonable simply by adopting and applying the *Rita* presumption. This remains true despite some courts of appeals' continued refusal to adopt the presumption.[160] Indeed, scholars concede that formally adopting the presumption often amounts to a "distinction without a difference[,]"[161] and even those courts that refuse to do so have recognized that within-Guidelines sentences are nearly always reasonable.[162] Consequently, all courts of appeals can benefit from the *Rita* presumption by limiting the number of cases that are subject to substantive reasonableness review.

After *Kimbrough*, outside-Guidelines sentences based on policy disagreements may also be considered reasonable, provided the district court has set forth an adequate rationale that is firmly

158. *Gall*, 552 U.S. at 51.

159. 2009 SOURCEBOOK, *supra* note 110 (noting that 56.8 percent of all sentences imposed in 2009 were within the applicable guidelines).

160. *See, e.g.*, United States v. Carty, 520 F.3d 984, 993-94 (9th Cir. 2008) (explicitly declining to adopt the presumption of reasonableness established in *Rita*).

161. *Carty*, 520 F.3d at 993-94 (citations omitted) (noting that "the difference appears more linguistic than practical: Those circuits that have not adopted a presumption of reasonableness have nevertheless concluded 'that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable.'"); Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIAMI L. REV. 1115, 1130 (Jul. 2008) (noting that "the decision whether to apply a presumption of reasonableness has had no measurable effect on the outcome of sentencing appeals.").

162. *Carty*, 520 F.3d at 994.

grounded in the Section 3553(a) factors. Although there remains some debate over which Guidelines are subject to disagreement, courts have indicated that a well-explained sentence is probably more likely to be found reasonable.[163] Therefore, after relying on existing precedent and applying *Rita*, *Gall*, and *Kimbrough*, fewer cases actually remain subject to the questions surrounding substantive reasonableness review.

Yet, for those cases that continue to defy reasonableness review, the Supreme Court has actually provided further guidance in *Gall* and *Kimbrough* in the form of heightened review.[164] The courts of appeals should remember that these statements are valuable tools for defining the scope of substantive reasonableness, not hindrances to effective appellate review. By employing the heightened review imagined in *Gall* and *Kimbrough*, the courts of appeals can characterize "reasonableness" as a continuum, rather than a single point. Consequently, courts may shift to a closer form of reasonableness review when a particular sentence calls for it and to more deferential review when it does not. This tactic will be particularly useful in cases where district courts attempt to push the bounds of their discretion by imposing sentences well outside the advisory Guideline range, or where they try to shoehorn a new policy objection into the *Kimbrough* framework. By recognizing that a particular sentence may be subject to much closer scrutiny, district court judges will be encouraged to consider all of the relevant factors when making a sentencing determination, rather than imposing sentences that increase disparity.

Furthermore, this approach will also allow the courts of appeals to overcome some of the difficulties that have followed *Gall* and *Kimbrough*. By closely reviewing those cases that the Supreme Court has identified, the courts of appeals will fulfill their responsibility to guide the district courts' discretion, while at the same time clarifying the contours of reasonableness review. As one of the last lines of defense against unwanted sentencing disparities and the developers of the larger body of sentencing law, the courts of appeals must embrace the tools that the Supreme Court has given them to ensure that district courts continue to exercise guided discretion. Nevertheless, once district courts and courts of appeals begin to work together by following the directives of guided discretion, the federal judiciary will begin to develop a stronger,

163. *Cf. Fumo*, 2011 WL 3672774, at *30-*31 (indicating that insufficient explanation is a common reason for reversing a sentence on procedural reasonableness grounds).

164. *See* discussion of the dicta in *Gall* and *Kimbrough supra* Parts II(C)(1)-(2).

more coherent body of sentencing law that may begin to approximate a "common law of sentencing."[165]

V. CONCLUSION

Six years after the landmark decision in *United States v. Booker*, federal sentencing remains a very controversial topic that has been the subject of significant study and scholarship. Although *Booker* and its progeny have given the federal courts guidance with respect to imposing and reviewing sentences, that guidance has led to almost as many questions as answers. Since *Booker*, district court judges have begun to exercise an incredible amount of discretion when making sentencing decisions, and the courts of appeals need to continue learning how to keep that discretion in check, while still giving proper deference to district court sentencing decisions.

This balance can be achieved through the use of guided discretion, wherein sentencing judges must carefully weigh the Section 3553(a) factors and impose a sentence that balances discretion with the need to reduce sentencing disparity. The sentencing judge must also thoroughly explain how he or she weighed the Section 3553(a) factors so as to provide a firm foundation on which reasonableness review can take place. At the court of appeals level, judges should follow the guidance set forth in *Rita*, *Gall*, and *Kimbrough* to aid in simplifying the appellate review process. However, when faced with difficult questions related to the substantive reasonableness of an outside-Guidelines sentence, the courts of appeals must not hesitate to engage in heightened review as directed by both *Gall* and *Kimbrough*. By carefully doing so, the courts of appeals will not only reduce problems associated with sentencing disparity at the district court level, but they will also begin to build and strengthen a more consistent and reliable definition of substantive reasonableness. Ultimately, as the federal sentencing saga continues to unfold, it remains to be seen whether more Supreme Court guidance is necessary, or whether the lower federal courts will work together to develop a strong body of law that will withstand the significant changes brought about by *Booker* and its progeny.

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165. *See* Appleman, *supra* note 40, at 4.

APPENDIX 1

STATISTICAL REVIEW OF SENTENCING APPEALS, 1996-2009			
Year	Sentence-only appeal	Sentence & Conviction appeal	Sentence Affirmed on Appeal
2009	57.1	74.1	82.9
2008	54.1	72.9	80.8
2007	53.9	77.9	79
2006	60	83.6	67.8
2005	55.3	81.2	54.7
2004	48.6	69	79.5
2003	51.7	72.6	79.3
2002	48	71.4	79.1
2001	51	72.6	78.1
2000	40.9	61.9	78.8
1999	37.4	60.4	80.1
1998	35.1	57.1	79.7
1997	38.7	59.9	79.4
1996	38.5	62.3	79.7
1996-2009 Average	47.9	69.8	77.1
Post-*Booker* Average	56.3	77.1	77.6
Pre-*Booker* Average	43.3	65.2	79.3
2005 - Post-*Booker*	56.2	84.2	49.9
2005 - Pre-*Booker*	52.1	70.5	74.6
Source: United States Sentencing Commission Sourcebooks of Federal Sentencing Statistics for fiscal years 1996-2009, *available at* http://www.ussc.gov/Data_and_Statistics/index.cfm			